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U.S. House of Representatives

Committee on Resources

Washington, DC 20515

November 26, 2003

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Chairman
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Federal Communications Commission
Office of the Secretary

Dear Chairman Nau:

It is our understanding that the Advisory Council is currently in the process of amending its Section 106 rules. In addition, we are also aware that the Federal Communications Commission (FCC) is considering a nationwide programmatic agreement that would govern the section 106 process for communication facilities. In light of these proceedings, we remain very concerned with the Council's rules extending the protections of Section 106 of the National Historic Preservation Act (NHPA) to properties only "potentially eligible" for the National Register of Historic Places.

As you are aware, Congress enacted NHPA, Section 106, in 1966 with the intent to protect the nation's important historic properties. Federal agencies were required by that law to consider the potential impacts of their own projects, and those they licensed or funded, on properties included in the National Register of Historic Places. In 1976, at the Council's request, Congress amended section 106 and extended that protection to properties beyond those actually included, to properties "eligible for inclusion in" the National Register. At the time of the 1976 amendment, the Council's rules defined a property "eligible for inclusion" for the National Register as a property expressly determined eligible by the Secretary of the Interior. That definition tracks with the regulations of the Department of the Interior even today. Three years later, however, without notice to or approval from Congress, the Council changed its regulations to define eligible property as "any [property] that meets the National Register Criteria.

This slight change of definition in the Council's rules has had significant consequences. In 1966, there were 12,000 properties on the National Register. Today, the Register lists over 77,000 properties with another 9,458 more on the list of properties determined eligible by the

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Keeper of the National Register. To earn both their place on these lists, and the protection of section 106, each of these listed or determined eligible properties went through several separate reviews, at the state and federal levels. In contrast, the number of properties that "meet the National Register criteria" is unknowable, but is probably in the many tens of millions, and none have been vetted for significance or the eligibility criteria of listed properties.

Among others, the wireless telecommunications industry has been particularly burdened by this policy. As you know, the FCC licenses cellular facilities and requires its licensees' projects to undergo section 106 review. Since cellular towers are often visible for great distances, State Historic Preservation Officers ("SHPOs") often define the Area of Potential Effects ("APE") from towers as circles, with the tower site in the center, and a radius of up to one or two miles, or more. Under the Council's rules, the licensee must hire experts to assess and document the eligibility (or non-eligibility) of every building, structure, and man-made or natural feature within the two to four-mile APE circle. This can require preparing "inventory forms" for hundreds of properties just for one single tower project.

In addition, the inclusion of potentially eligible properties and the requirement of assessment of visual effects from cellular towers, threatens to have the cumulative effect of turning section 106 into a virtual national zoning statute, to the detriment of the rights of millions of private property owners. Projects on land miles away from unconfirmed, but potentially eligible historic properties, can be delayed or stopped due either to the inability of industry to absorb the burdens and costs of what would otherwise be an unnecessary section 106 review, or by the extension of local land use ordinances aimed at discouraging construction of legitimately listed historic properties. Local laws are increasingly being used to discourage development by those who may, or may not, have an interest in historic preservation.

The abuse of these policies inevitably damage the cause of historic preservation, and run counter to the goals you have pursued in your tenure as chairman. To that end, we hope that you will consider addressing and correcting this problem in the Council's current rulemaking, and/or in the programmatic agreement negotiations with the Federal Communications Commission and the National Conference of State Historic Preservation Officers (NCSHPO).

However, should the Council fail to act in deliberate manner on this issue, please know that we will not hesitate to take actions to restore Section 106 to the carefully defined scope originally intended by Congress.

We are confident that the FCC and the NCSHPO support your efforts to strengthen and invigorate historic preservation while at the same time abandoning wasteful, counterproductive and unnecessary regulation.

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Thank you for your consideration of our comments.

Sincerely,



Richard Pombo
Chairman
Committee on Resources



George Radanovich
Chairman
Subcommittee on National Parks,
Recreation and Public Lands

cc: Michael Powell, Chairman
Federal Communications Commission

Edward Sanderson, President
National Conference of State Historic Preservation Officers